ADAM PRIMUS VARGHESE ABDULLAH v. WEE LOKE CHOON & ORS AND ANOTHER APPEAL

COURT OF APPEAL, PUTRAJAYA
TENGKU MAIMUN TUAN MAT JCA
NALLINI PATHMANATHAN JCA
ZABARIAH MOHD YUSOF JCA
[CIVIL APPEALS NO: N-01(NCVC)(A)-85-03-2017
& N-02(NCVC)(A)-465-03-2017]
15 AUGUST 2018

CIVIL PROCEDURE: *Courts – Court hierarchy – High Court ordered sale and auction of land – Order for sale set aside by Court of Appeal – Court of Appeal ordered second order for sale of land and second auction – Matter remitted back to High Court – Failure of High Court to comply with orders of Court of Appeal – Fundamental principle that order of higher courts must take precedence over that of lower courts – Compliance with and implementation of orders of higher courts – Whether strict – Consequences of failure of High Court to comply with orders of Court of Appeal or Federal Court – Whether gave rise to contempt – Whether order tainted with illegality and ought to be set aside*

LAND LAW: *Indefeasibility – Indefeasibility of title – Land obtained through auction at High Court – Order for sale already set aside by Court of Appeal – Court of Appeal ordered second order for sale of land and second auction – Matter remitted back to High Court – Failure of High Court to comply with orders of Court of Appeal – Whether bid for land and acceptance of same rendered null and void – Whether title holder enjoyed indefeasibility of title – Whether title flawed and defeasible – National Land Code, s. 340*

Popular Acres Sdn Bhd ('PA'), the previous registered owner of a piece of land, created a third party charge over the said land in favour of Southern Bank as security for a term loan and overdraft facilities. The assets of the bank subsequently devolved through other entities so as to vest in the second respondent, the chargee, South East Asia Special Asset Management Bhd ('SEASM'). At the High Court, SEASM successfully obtained an order for sale of the land through public auction ('the first HC order'). The attempt by PA to set aside the order for sale was dismissed by the High Court. The first respondent ('Wee') was the successful bidder in the public auction ('the first public auction'). In the meantime, the Court of Appeal allowed the appeal by PA against the first HC order and the application by SEASM to sell the land was ordered to be re-heard at the High Court ('the first COA order'). At this point in time, Wee's offer to purchase the land had been accepted by SEASM and Wee proceeded to enter a private caveat on the land. SEASM's application to sell the land was re-heard at the High Court, but was dismissed. SEASM appealed against the said decision and the Court of

Appeal allowed the appeal which, in effect, allowed the application for an order for sale ('the second COA order'). SEASM applied for an order that the sale of the land to Wee, by way of the first public auction, be set aside but this application was dismissed by the High Court ('the HC order dated 19 March 2014'). This order was made despite the second COA order allowing the second order for sale. However, no second public auction was held, as directed by the Court of Appeal in both its first and second orders ('the COA orders'). Instead, SEASM procured a certificate for sale in favour of Wee together with the documents of title. The land was then registered in Wee's name. Pursuant to this, PA applied to the High Court, seeking to set aside the first public auction, on the grounds that the certificate of sale obtained by Wee was wrongfully obtained given the two COA orders. The High Court dismissed PA's application on the grounds that (i) PA was precluded by the principles of *res judicata* from obtaining the relief sought because it was relying on the same principles as had been relied on by SEASM in its application to set aside the first public auction; (ii) PA's application was an abuse of process as it should have appealed against the decision of the order of the High Court dismissing the application to set aside the sale to Wee, which was made by SEASM and not PA; and (iii) the High Court had no concurrent jurisdiction to set aside the HC order dated 19 March 2014. Hence, the present appeals by (i) PA challenging the validity of the sale of the land by SEASM to Wee ('Appeal 465'); and (ii) PA's liquidator against Wee's successful application to remove the private caveat entered on the land by the liquidator ('Appeal 85'). The outcome of Appeal 465 would determine the outcome of Appeal 85. The issues that arose for adjudication were (i) whether the sale of the land by way of the first public auction valid given that the first HC order was set aside by the Court of Appeal; (ii) whether the HC order dated 19 March 2014 had the effect of approving and validating a sale of the land to Wee; and (iii) whether PA was caught by *res judicata* from bringing this application.

Held (allowing appeals)

Per Nallini Pathmanathan JCA delivering the judgment of the court:

(1) The traditional hierarchical model of the Judiciary in Malaysia envisions the High Court as comprising the base of the judicial pyramid of the superior Judiciary, the Court of Appeal the middle and the Federal Court the apex of the pyramid. As such, the High Court simply implements the orders of the Court of Appeal; as does the latter in relation to orders of the Federal Court. It is the strict implementation of this judicial structure that lends certainty, rigor and order to the system of law as formulated. Failure of the High Court to comply with the orders of the Court of Appeal or Federal Court, if not corrected, would give rise to chaos and amount to a failure to comply with the rule of law. The order of a higher court is not to be ignored or by-passed with impunity. (paras 41 & 43)

(2) The events leading up to the sale to Wee and the current status of Wee as enjoying indefeasible title to the land, under s. 340 of the National Land Code, ignored the express and mandatory effect of the first COA order setting aside the first HC order and were in defiance of the fundamental principle that an order of a higher court must take precedence over that of a lower court. In this case, the order of the Court of Appeal appeared to have been disobeyed with impunity and could give rise to contempt if so pursued. This was not simply a case of *stare decisis*, where there was failure to comply with a binding precedent issued by a higher court. It went further than that because the High Court simply chose not to comply with the orders which were directly relevant and binding on it, to the issues at hand, which consequently gave rise to the present difficulties encountered by the parties. (paras 39, 40 & 44)

(3) Wee's bid for the land and the acceptance of the same was rendered null and void by the first COA order because the first public auction became null and void as the order for sale, on which it was predicated, was set aside. It followed that there could be no valid sale of the land to Wee. This was supported and emphasised by the second COA order which held that a second public auction was to be held. If there was no valid sale, the certificate of sale issued pursuant to the HC order dated 19 Mac 2014 was similarly null and void as that order was fatally irregular. Therefore, the title obtained by Wee was similarly flawed and defeasible because it was acquired by way of a void instrument. The title to the land ought to be reverted to PA as the registered owner subject to the charge in favour of SEASM. Wee was entitled to the refund of his monies. (paras 54-57)

(4) While there was no breach of a statute, there was a clear and flagrant flouting or failure to comply with the express orders of a higher court, rendering the orders of the High Court null and void. This amounted to an illegality. It was clear that the HC order dated 19 March 2014 did not have the effect of validating the order for sale or the sale to Wee of the subject land. A court of unlimited jurisdiction has inherent power to set aside its order made in breach of written law. The principle of *res judicata* did not apply in light of the illegality of the HC order dated 19 March 2014 which expressly contravened or failed to adhere to the two COA orders. *Res judicata* did not operate to prevent the setting aside of the flawed HC order dated 19 March 2014. (paras 62, 64, 66 & 67)

(5) As it had been concluded that the sale of the land by SEASM to Wee by way of the first public auction was void, the appropriate remedy to be granted against the liquidator was to allow the caveat to remain as the liquidator had established a registrable interest in the land. (paras 72 & 73)

Bahasa Malaysia *Headnotes*

Popular Acres Sdn Bhd ('PA'), pemilik berdaftar terdahulu sebidang tanah, membuat gadaian pihak ketiga atas tanah tersebut, pada Southern Bank, sebagai cagaran kemudahan pinjaman berjangka dan overdraf. Aset-aset bank seterusnya diturunkan kepada entiti-entiti lain dan diletak hak pada responden kedua, iaitu pemegang gadaian, South East Asia Special Asset Management Bhd ('SEASM'). Di Mahkamah Tinggi, SEASM berjaya memperoleh satu perintah jualan tanah melalui lelongan awam ('perintah pertama MT'). Usaha PA untuk mengetepikan perintah jualan ini ditolak oleh Mahkamah Tinggi. Responden pertama ('Wee') ialah pembida berjaya dalam lelongan awam yang dijalankan ('lelongan awam pertama'). Sementara itu, Mahkamah Rayuan membenarkan rayuan PA terhadap perintah pertama MT dan permohonan SEASM untuk menjual tanah diperintahkan didengar semula di Mahkamah Tinggi ('perintah pertama MR'). Pada masa ini, tawaran Wee untuk membeli tanah diterima oleh SEASM dan Wee seterusnya memasukkan kaveat persendirian atas tanah tersebut. Permohonan SEASM untuk menjual tanah didengar semula di Mahkamah Tinggi tetapi ditolak. SEASM merayu terhadap keputusan ini dan Mahkamah Rayuan membenarkan rayuan yang, kesannya, membenarkan permohonan jualan ('perintah kedua MR'). SEASM memohon perintah agar jualan tanah kepada Wee, melalui lelongan awam pertama, diketepikan tetapi permohonan ini ditolak oleh Mahkamah Tinggi ('perintah MT bertarikh 19 Mac 2014'). Perintah ini dibuat walaupun perintah kedua MR membenarkan perintah jualan kedua. Walau bagaimanapun, tiada lelongan awam, seperti diperintahkan oleh Mahkamah Rayuan dalam perintah pertama dan keduanya ('perintah-perintah MR'), dijalankan. Sebaliknya, SEASM memperoleh sijil jualan untuk Wee bersama-sama dengan dokumen-dokumen hak milik. Tanah tersebut didaftar bawah nama Wee. Berikutan itu, PA memohon di Mahkamah Tinggi, untuk mengetepikan lelongan awam pertama, atas alasan sijil jualan yang diperoleh oleh Wee diperoleh secara salah atas sebab dua perintah MR itu. Mahkamah Tinggi menolak permohonan PA atas alasan (i) PA dihalang oleh prinsip *res judicata*, daripada memperoleh relief yang dipohon kerana bergantung pada prinsip-prinsip sama yang menjadi sandaran SEASM dalam permohonannya mengetepikan lelongan awam pertama; dan (ii) permohonan PA ialah satu salah guna proses kerana PA sepatutnya merayu terhadap keputusan perintah Mahkamah Tinggi menolak permohonan mengetepikan jualan tersebut kepada Wee, yang dibuat oleh SEASM dan bukan PA; dan (iii) mahkamah tiada bidang kuasa serentak untuk mengetepikan perintah MT bertarikh 19 Mac 2014. Maka timbul rayuan-rayuan ini oleh (i) PA yang mencabar kesahan perintah jualan oleh SEASM kepada Wee ('Rayuan 465'); dan (ii) pelikuidasi PA terhadap Wee yang berjaya dalam permohonannya untuk menyingkirkan

kaveat persendirian yang dimasukkan atas tanah tersebut oleh pelikuidasi ('Rayuan 85'). Keputusan Rayuan 465 akan menentukan keputusan Rayuan 85. Isu-isu yang timbul untuk pertimbangan adalah (i) sama ada jualan tanah melalui lelongan awam pertama sah memandangkan perintah pertama MT diketepikan oleh Mahkamah Rayuan; (ii) sama ada perintah MT bertarikh 19 Mac 2014 mempunyai kesan membenarkan dan mengesahkan jualan tanah kepada Wee; dan (iii) sama ada PA dihalang daripada mengemukakan permohonan ini bawah *res judicata*.

Diputuskan (membenarkan rayuan-rayuan)
Oleh Nallini Pathmanathan HMR menyampaikan perintah mahkamah:

(1) Model hierarki tradisional kehakiman Malaysia membayangkan Mahkamah Tinggi membentuk asas piramid kehakiman tertinggi, di tengah-tengahnya Mahkamah Rayuan dan Mahkamah Persekutuan sebagai puncak piramid tersebut. Oleh itu, Mahkamah Tinggi sekadar melaksanakan perintah-perintah Mahkamah Rayuan sebagaimana Mahkamah Rayuan melaksanakan perintah-perintah Mahkamah Persekutuan. Pelaksanaan ketat struktur kehakiman ini menjamin kepastian, kerapian dan keteraturan sistem undang-undang seperti yang dirangka. Kegagalan Mahkamah Tinggi mematuhi perintah-perintah Mahkamah Rayuan dan Mahkamah Persekutuan, jika tidak dibetulkan, akan menimbulkan kacau bilau dan terjumlah sebagai kegagalan mematuhi kedaulatan undang-undang. Perintah Mahkamah yang lebih tinggi tidak boleh tidak diendahkan atau dipintas tanpa apa-apa hukuman.

(2) Kesemua peristiwa hingga jualan kepada Wee dan status semasa Wee yang menikmati hak milik tak boleh disangkal atas tanah, bawah s. 340 Kanun Tanah Negara, mengabaikan kesan nyata dan mandatori perintah pertama MR yang mengetepikan perintah pertama MT dan bertentangan dengan prinsip asas bahawa satu perintah mahkamah yang lebih tinggi mestilah mendahului perintah mahkamah yang lebih rendah. Dalam kes ini, perintah Mahkamah Rayuan telah tidak dipatuhi tanpa dihukum dan boleh menimbulkan penghinaan jika diteruskan. Ini bukan sekadar satu kes *stare decisis*, iaitu berlaku kegagalan mematuhi duluan mengikat yang dikeluarkan oleh mahkamah yang lebih tinggi. Ini lebih melampau kerana Mahkamah Tinggi memilih untuk tidak mematuhi perintah-perintah relevan dan mengikat atasnya secara langsung, tentang isu-isu yang timbul, yang seterusnya menimbulkan kesusahan yang kini dialami oleh pihak-pihak.

(3) Bidaan Wee atas tanah dan penerimaannya tidak sah dan terbatal oleh perintah pertama MR kerana lelongan awam pertama menjadi tidak sah dan terbatal kerana perintah jualan, yang menjadi asasnya, diketepikan. Bersangkutan itu, tiada jualan tanah yang sah kepada Wee. Ini disokong

dan ditekankan oleh perintah kedua MR yang memutuskan lelongan kedua harus dijalankan. Jika tiada jualan sah, sijil jualan yang dikeluarkan bawah perintah MT bertarikh 19 Mac 2014 juga sama tidak sah dan terbatal kerana perintah tersebut tidak teratur akibat cacat. Oleh itu, hak milik yang diperoleh oleh Wee sama cacat dan boleh disangkal kerana diperoleh melalui instrumen terbatal. Hak milik tanah harus dikembalikan kepada PA sebagai pemilik berdaftar tertakluk pada gadaian pada SEASM. Wee berhak mendapat semula wangnya.

(4) Walaupun tiada pelanggaran statut, jelas dan terang-terangan terdapat bangkangan atau kegagalan mematuhi perintah-perintah nyata mahkamah yang lebih tinggi, menjadikan perintah-perintah Mahkamah Tinggi tidak sah dan terbatal. Ini terjumlah sebagai ketaksahan. Perintah MT bertarikh 19 Mac 2014 jelas tidak mempunyai kesan mengesahkan perintah jualan atau jualan tanah yang menjadi pertikaian kepada Wee. Mahkamah yang mempunyai bidang kuasa tidak terbatas mempunyai kuasa inheren mengetepikan perintahnya yang dibuat melanggar undang-undang. Prinsip-prinsip *res judicata* tidak terpakai akibat ketaksahan perintah MT bertarikh 19 Mac 2014 yang nyata bercanggah atau gagal mematuhi dua perintah MR. *Res judicata* tidak beroperasi untuk menghalang pengetepian perintah MT bertarikh 19 Mac 2014 yang cacat.

(5) Oleh kerana diputuskan bahawa jualan tanah oleh SEASM kepada Wee melalui lelongan awam pertama tidak sah, remedi yang sesuai diberi kepada pelikuidasi ialah membenarkan kaveat kekal kerana pelikuidasi berjaya membuktikan kepentingan boleh-daftar atas tanah.

Case(s) referred to:

Badiaddin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd [1998] 2 CLJ 75 FC ***(foll)***

Maimunah Megat Montak v. Mayban Finance Bhd [1996] 3 CLJ 9 FC ***(refd)***

Legislation referred to:

National Land Code, ss. 256, 257(1)(d), 259(3), 340(2)(b)

(Civil Appeals No: N-01(NCVC)(A)-85-03-2017 & N-02(NCVC)(A)-465-03-2017)

For the appellant - HY Chong, Muhammad Iqram Zulkupri & Michael Koh; M/s Azman Davidson & Co

For the 1st respondent - Manian Raju & Pung Jenn Jian; M/s Krishna Dallumah, Manian & Indran

For the 2nd respondent - Ahmad Zamri Khuziami & TK Chong; M/s Che Mokhtar & Ling

(Civil Appeal No: N-01(NCVC)(A)-85-03-2017)

For the 3rd respondent - Rozaimah Adnan & Muhammad Fairuz; SFC

[Editor's note: Appeal from High Court, Seremban; Originating Summons No: 24NCVC-147-06-2016 & 24NCVC-202-8-2016 (overruled).]

Reported by Najib Tamby

JUDGMENT

Nallini Pathmanathan JCA:

Introduction

[1] There are two appeals that arise for consideration, namely Appeal No. N-02(NCVC)(A)-465-03-2017 ('Appeal No. 465'), which is brought by Popular Acres Sdn Bhd (in liquidation) ('Popular Acres') and Appeal No. N-01(NCVC)(A)-85-03-2017 ('Appeal No. 85'), which is brought by the liquidator of Popular Acres, namely Adam Primus Varghese bin Abdullah ('the liquidator'). These two appeals relate to the sale by public auction of a piece of land held under Geran 61156, Lot 2490, Mukim Rasah, Daerah Seremban, Negeri Sembilan ('the land').

[2] As the outcome of Appeal No. 465 will effectively determine the outcome of Appeal No. 85, we shall in this judgment refer to and deal with the issues in Appeal No. 465. This will bind and determine Appeal No. 85.

[3] Popular Acres was the previous registered owner of the land. It created a third party charge in favour of Southern Bank on 23 January 2006. The assets of the said bank subsequently devolved through other entities so as to vest in the second respondent here, the chargee, South East Asia Special Asset Management Berhad ('SEASM').

[4] Wee Loke Choon, the first respondent here ('Wee') was the successful bidder in a public auction held at the Kuala Lumpur High Court on 1 November 2012 ('first public auction').

[5] Although Wee was the successful bidder at the first public auction as of 1 November 2012, the Court of Appeal on 22 February 2013 allowed an appeal against the order of the High Court sanctioning the sale and held that the order for sale (being the basis for the first public auction) be set aside ('the first Court of Appeal order setting aside the first order for sale'). At this point in time Wee's offer to purchase the land had been accepted by SEASM.

[6] However further to other orders of the Court of Appeal and High Court (which will be set out in detail below), a second public auction was never held, as intended and effectively directed by the Court of Appeal in both its first and subsequent order. There was effectively no compliance with the orders of the Court of Appeal.

[7] Instead SEASM, through its solicitors, procured a certificate for sale in favour of Wee together with the documents of title.

[8] *Vide* these appeals both appellants, namely Popular Acres and the liquidator, challenge the validity of the sale of the land to Wee by SEASM. And this challenge is premised primarily on the fact that the first order for sale was set aside *vide* the first order of the Court of Appeal. In order to comprehend the challenge, it is necessary to consider the salient facts surrounding these appeals.

A **Salient Factual Matrix**

[9] Popular Acres was the registered owner of the land. On 23 January 2006, it charged the land to Southern Bank Berhad as security for a term loan facility of RM1,000,000 as well as an overdraft facility of RM1,000,000 ('facilities') granted to two individual borrowers.

B

[10] Subsequently all of Southern Bank's rights and liabilities, including the charge created by Popular Acres, were vested in Bumiputra-Commerce Bank *vide* order of court dated 6 September 2006. By order of court dated 15 January 2010 all rights and liabilities arising from the charge were then vested in SEASM.

C

The First Order For Sale

[11] On 23 December 2011, SEASM filed an originating summons applying for an order for sale of the land. On 29 February 2012, an order for sale was granted by the High Court in Kuala Lumpur. On 25 July 2012

D Popular Acres filed an application to set aside the order dated 29 February 2012 but this application was dismissed.

[12] SEASM therefore proceeded to procure an order to sell the land by way of public auction on 4 October 2012.

E **[13]** On 19 October 2012, Popular Acres filed an appeal against the High Court decision to the Court of Appeal.

[14] On 1 November 2012 the first auction was carried out pursuant to the first High Court order for sale of the land. Wee put in a bid at the first auction and his bid was accepted.

F

[15] On 22 February 2013, the Court of Appeal allowed Popular Acres' appeal against the decision of the High Court making the order for sale ('the first Court of Appeal order setting aside the first order for sale'). As a consequence, the order for sale dated 29 February 2012 was set aside. It was ordered that the application by the chargee, SEASM, to sell the land be re-

G heard in the Kuala Lumpur High Court.

[16] As Wee's bid to purchase the land had been accepted by this point in time, he proceeded to enter a private caveat on the land on 3 April 2013.

[17] Pursuant to the first Court of Appeal order setting aside the order for

H sale, SEASM's application for leave to sell the land was re-heard by the High Court in Kuala Lumpur on 15 May 2013, but was dismissed ('the second High Court decision dismissing the application for an order for sale').

[18] SEASM therefore appealed against the second High Court decision.

I

[19] On 8 January 2014 the Court of Appeal allowed SEASM's appeal, allowing in effect the application for an order for sale ('the second Court of Appeal order allowing the second order for sale').

[20] In the interim, prior to this, in June and July 2013 two matters of relevance transpired:

(a) A petition to wind up Popular Acres was presented by Alliance Bank Malaysia Berhad;

(b) SEASM filed an application on 3 July 2013 seeking an order that the sale of the land to Wee *vide* the first public auction be set aside and that the full purchase price paid by him in the sum of RM820,000 be set aside;

(c) Wee applied to intervene and oppose SEASM's application in October 2013;

(d) The Kuala Lumpur High Court then once again dismissed SEASM's application to set aside the purported sale of the land to Wee on 19 March 2014. This order was made despite the second Court of Appeal order reversing the order of the High Court refusing to grant an order for sale, in other words, allowing the second order for sale;

(e) SEASM did not appeal against this order.

[21] Popular Acres was wound up on 11 March 2014.

[22] Subsequent to this on 28 October 2014, SEASM's solicitors wrote to the Kuala Lumpur High Court advising that Wee had paid the purchase price in full. SEASM sought the issuance of a certificate for sale in favour of Wee. Wee procured the certificate for sale by court within a month, on 24 November 2014. The land was then registered in Wee's name subsequently on 3 March 2017.

The Originating Summons Comprising The Subject Matter Of This Appeal And The Decision Of The High Court

[23] Pursuant to this, Popular Acres applied to the High Court at Seremban seeking to set aside the first auction, on the grounds *inter alia* that the certificate of sale obtained by Wee was wrongfully obtained given the two orders of the Court of Appeal. The first order of the Court of Appeal setting aside the first order for sale comprised the basis for such application. As the first order for sale comprised the basis for any valid sale, and such order had been set aside, it was contended that the sale to Wee could not be validated.

[24] On 28 February 2017 the High Court at Seremban dismissed the application by Popular Acres. It is this originating summons that comprises the subject matter of the appeal before us. The High Court held, *inter alia* that Popular Acres was precluded by the principles of *res judicata* from obtaining the relief sought because it was relying on the same principles as had been relied on by SEASM in its application to set aside the first auction.

[25] Secondly, the High Court held that Popular Acres' application is an abuse of process as it should have appealed against the decision of the order of the High Court dismissing the application to set aside the sale to Wee. (This application was made by SEASM and not Popular Acres). Further, the High Court held that it had no concurrent jurisdiction to set aside the order by the High Court at Kuala Lumpur dated 19 March 2014.

The Arguments Put Forward By Learned Counsel For The Appellant And The Respondent

[26] Popular Acres submitted, *inter alia*, that the learned judge erred in concluding that the earlier High Court decision dismissing the application by SEASM to set aside the first sale had the effect of validating the first sale in favour of Wee. This was because the High Court only dismissed SEASM's application but did not expressly validate it.

[27] The learned judge failed to consider the effect of the first Court of Appeal order dated 22 February 2013 which stated that: "Perintah Jualan bertarikh 29 Februari 2012 serta saman minta arahan bertarikh 8 Mei 2012 diketepikan." Accordingly, the first sale was void.

[28] Further, the order of the High Court dated 19 March 2014 dismissing SEASM's application to set aside the sale could not override the express orders of the Court of Appeal, both the first order rendering the first order for sale void, as well as the second order of the Court of Appeal holding that the second order for sale was valid. This meant in effect that a second public auction ought to have been held.

[29] Apart from being contrary to the principle of *stare decisis* it would amount to a direct contradiction of two orders of a higher court by a lower court, which is wholly untenable. It effectively renders the decision of the lower court void as the lower court has made an order in defiance of the order of the higher court.

[30] Finally, the principle of *res judicata* was simply not applicable because Popular Acres was not seeking to re-litigate the 19 March 2014 order. Instead, Popular Acres (and necessarily the liquidator in the other appeal, Appeal No. 85) were seeking a declaration and enforcement of the first and second Court of Appeal orders.

[31] In support of the contention that the High Court hearing this originating summons had the jurisdiction to set aside the earlier High Court decision, notwithstanding its concurrent jurisdiction, reliance was placed on *Badiaddin bin Mohd Mahidin v. Arab Malaysia Finance Bhd.* [1998] 2 CLJ 75; [1998] 1 MLJ 393.

[32] Popular Acres also submitted on the issue of the validity of the sale to Wee by reason of the foregoing. In this context, it was contended that the issuance of the certificate was *ultra vires* for failure to comply with the strict requirements of the National Land Code ('NLC').

[33] Section 257(1)(d) of the NLC had not been adhered to and this in itself was fatal to the order for sale (see *Maimunah bte Megat Montak v. Mayban Finance Bhd* [1996] 3 CLJ 9; [1996] 2 MLJ 422). This is because, once the first order for sale of 29 November 2012 was set aside by the Court of Appeal, the Registrar had no power or authority under the National Land Code (NLC) to issue a certificate of sale pursuant to the first auction, which was void. Any such power exercised by the Registrar under s. 259(3) of the NLC had to be pursuant to a valid order for sale under s. 256 of the NLC.

Our Decision And Analysis

[34] The appeal before us relates to the order of the High Court at Seremban dated 28 February 2017 where the latter refused the application by Popular Acres for a declaration that the sale of its land by SEASM to Wee pursuant to the first public auction on 1 November 2012 was void. The basis for such application by Popular Acres is the first order of the Court of Appeal setting aside the first order for sale.

[35] Moreover the second order of the Court of Appeal had ordered that a second auction be held, thereby further supporting and emphasising the validity of the first order of the Court of Appeal.

[36] As stated above, the grounds relied on by the High Court in making such an order were three-fold:

(a) Popular Acres was caught by the principle of *res judicata*;

(b) The application was an abuse of process as Popular Acres ought to have appealed against the earlier decision of the High Court dated 19 March 2014 refusing to set aside the first order for sale;

(c) The High Court had no concurrent jurisdiction to set aside the order by the High Court at Kuala Lumpur dated 19 March 2014.

[37] In order to ascertain whether the grounds set forth by the High Court in Appeal No. 465 are correct, we concur with learned counsel for the appellant that the primary legal issues that fall for consideration are:

(a) Whether the sale of the land *vide* the first public auction is valid given that the first order for sale granted by the High Court was subsequently set aside by the Court of Appeal?

(b) Whether the High Court order of 19 March 2014 dismissing SEASM's application to set aside the public auction of 1 November 2012 had the effect of approving and validating a sale of the subject land to Wee?

(c) Whether Popular Acres is caught by *res judicata* from bringing this application?

Issue(a): Whether The Sale Of The Land Vide The First Public Auction Is Valid Given That The First Order For Sale Granted By The High Court Was Subsequently Set Aside By The Court Of Appeal?

[38] It is not in dispute that Wee purchased the land pursuant to the first public auction dated 1 November 2012, which in turn was held and concluded pursuant to the first order for sale dated 29 February 2012. This "sale" by public auction to Wee was sought to be validated *vide* a certificate of sale sought by SEASM from the High Court. Such certificate of sale was granted by the High Court on 24 November 2014 together with the documents of title on 24 November 2014.

[39] However this entire sequence of events leading up to the sale to Wee and the current status of Wee as enjoying indefeasible title to the land under s. 340 of the NLC ignores the express and mandatory effect of the first order of the Court of Appeal dated 22 February 2013 setting aside the first order for sale granted by the High Court.

[40] The significance of the first order of the Court of Appeal of 22 February 2013 setting aside the first order for sale appears to have been completely ignored by SEASM and Wee as well as the High Court in defiance of the fundamental principle that an order of a higher court does and must take precedence over that of a lower court.

[41] The very structure and basis of the system of adjudication in our courts requires complete and absolute adherence to this principle. The traditional hierarchical model of the Judiciary in Malaysia envisions the High Court as comprising the base of the judicial pyramid of the superior Judiciary, the Court of Appeal the middle, and the Federal Court the apex of the pyramid. As such, the High Court simply implements the orders of the Court of Appeal, as does the latter in relation to orders of the Federal Court. It is the strict implementation of this judicial structure that lends certainty, rigor and order to the system of law as formulated.

[42] In as much as Federal Court orders and judgments are viewed as the reigning law of the land, in the context of the instant case, the orders of the Court of Appeal have the same "reigning" effect *vis a vis* the High Court. The complete impunity with which the High Court simply ignored two orders of the Court of Appeal *vide* its orders of 19 March 2014 and 28 February 2017 invite serious consideration.

[43] Failure of the High Court to comply with orders of the Court of Appeal or Federal Court, if not corrected, would give rise to chaos and amount to a failure to comply with the rule of law. The order of a higher court is not to be ignored or by-passed with impunity. (It is only where such an order of the higher court has been held to be illegal by a subsequent order, that it need not be complied with).

[44] In the instant case, the order of this court appears to have been disobeyed with impunity and could give rise to contempt if so pursued. It should be pointed out that this is not simply a case of *stare decisis*, where there was a failure to comply with a binding precedent issued by a higher court. It goes further than that because the High Court here chose not to comply with orders which are directly relevant and binding on it, to the issues at hand, thereby giving rise to the present difficulties encountered by the parties.

[45] The net result of the failure to comply with the first order of the Court of Appeal setting aside the first order for sale is that the first public auction at which Wee put in a bid for the land is void. It is void because once the first order for sale was held to have been set aside, there was no legal basis on which the public auction could be held. There was no valid or in fact any order for sale on which the public auction could be premised. So any tender or bid or acceptance of the same was of no legal effect.

[46] The effect of the first order of the Court of Appeal was further emphasised, reiterated and underscored by the second order of the Court of Appeal dated 8 January 2014, reversing the order of the High Court refusing to order a public auction. The express words of the second order of the Court of Appeal stipulated and directed that a second public auction be held. In other words, the acceptance of Wee's bid was rendered ineffective, null and void, by virtue of this second order of the Court of Appeal, separately and in addition to the first order of the Court of Appeal. This in turn meant that there was no effective acceptance of Wee's bid, and it follows that there could be no effective sale of the land to Wee.

[47] The decision of the High Court at Kuala Lumpur dated 19 March 2014 dismissing SEASM's application to set aside the order for sale in favour of Wee, stands out as yet another decision ignoring and flying in the face of, both the first and second orders of the Court of Appeal.

[48] What then, it will be asked, of this order of the High Court dated 19 March 2014, which ignored the effect of both the first order of the Court of Appeal dated 29 February 2012 and the second order of the Court of Appeal dated 8 January 2014?

[49] It remains on record and, as it has not been appealed against, remains (it is contended) binding. It is argued by the respondents that as SEASM failed to appeal against that decision, it stands and remains as a binding order of court, comprising the basis, *inter alia*, for the contention of *res judicata.* This however is a flawed argument as it fails to consider the flagrant disobedience of the High Court to the two orders of the Court of Appeal, invalidating the first auction and thereby any purported sale made pursuant to such auction. In point of fact, the decision of the High Court is in direct contradistinction to that of the Court of Appeal.

[50] Apart from the High Court's refusal to give effect to the orders of the Court of Appeal, we also note that much time and expense was expended by virtue of SEASM's unnecessary application to set aside the first sale of the land to Wee. This application was unnecessary in light of the first order of the Court of Appeal invalidating the first auction. The Court of Appeal had on 22 February 2013 set aside the first order for sale and ordered a re-hearing. Since the matter was re-heard by the High Court and went up on appeal to the Court of Appeal, the first order for sale dated 29 February 2012 was no longer valid, but in fact null and void. Therefore, there was no need for SEASM to attempt to have it set aside by way of the notice of application filed on 3 July 2013 in the High Court as the Court of Appeal had already done so on 22 February 2013.

[51] In any event, the first order for sale has become redundant by reason of the second order for sale granted by the Court of Appeal on 8 January 2014.

[52] The decision of the High Court in the instant appeal is therefore a decision that is appropriate to be set aside on the grounds envisaged in the case of *Badiaddin* ('above'). The decision of the High Court is inherently flawed as it is in direct opposition to and seeks to contravene two orders of a higher court which were handed down prior to its decision. It is *prima facie* flawed or incorrect, warranting its setting aside as being a nullity or fatal irregularity. This will be discussed further below.

[53] The net result in relation to the instant appeal is that the learned judge was plainly wrong in concluding that the sale of the land *vide* the first public auction was valid given that:

(a) the first order for sale granted by the High Court was subsequently set aside by the first order of the Court of Appeal dated 29 February 2012;

(b) the Court of Appeal *vide* its second order dated 8 January 2014 expressly ordered that a second or new auction be carried out.

[54] In these circumstances, as explained above, Wee's bid for the land and the acceptance of the same was rendered null and void by the first order of the Court of Appeal. This is because the first auction in itself became null and void as the order for sale on which it was predicated, was set aside.

[55] It follows that if there was no valid auction and no valid bid nor acceptance, there could be no valid sale of the land to Wee. This is further supported and emphasised by the second order of the Court of Appeal which held that a second auction was to be held.

[56] If there was no valid sale, it follows that the certificate of sale issued by the Registrar pursuant to the order of the High Court of 19 March 2014 is similarly null and void as that order is fatally irregular in itself. Accordingly it would follow that the title obtained by Wee is similarly flawed and thus defeasible because it was acquired *vide* a void instrument.

[57] Under the provisions of s. 340(2)(b) of the NLC, any title acquired as a consequence of a void instrument is rendered defeasible and is available to be set aside as of right by the rightful party asserting title to the same. In the instant case, the registered owner of the land is Popular Acres, while SEASM has a charge in its favour. As the purported sale to Wee is invalid which consequently renders the title acquired defeasible under s. 340(2)(b) of the NLC, it follows that title to the said land ought to revert to Popular Acres as the registered owner subject to the charge in favour of SEASM. Wee is entitled to the refund of his monies and such other recourse as may be available in law.

Issue (b): Whether The High Court Order Of 19 March 2014 Dismissing SEASM's Application To Set Aside The Public Auction Of 1 November 2012 Had The Effect Of Approving And Validating A Sale Of The Subject Land To Wee?

[58] For the reasons we have set out above, the High Court order of 19 March 2014 did not and could not have the effect of approving and validating the sale of the land to Wee. This is because there was never any valid sale of the land to Wee as the first order for sale was null and void. All acts subsequent to the same in furtherance of such purported sale were equally null and void.

[59] It is appropriate at this juncture to consider the Federal Court decision in *Badiaddin* (above). The facts are well known. There the appellants were the registered co-owners of a piece of Malay reserve land. A third party charge was created in favour of the respondent finance company as security for a loan given by the finance company to another person. The finance company obtained an order for the sale of the land under the NLC but the order was later set aside by the court on the grounds that the charge was illegal as the charge was not "Malay" for the purposes of the Malay Reservation Enactment.

[60] Two years later the finance company again applied before the same court and obtained an order for the sale of the land by public auction. The appellants in *Badiaddin* (above) applied to a separate court of concurrent jurisdiction to declare the second order of sale void and have it set aside on the ground that such order contravened the Enactment. They succeeded in setting aside the second order in the High Court but failed in the Court of Appeal which held *inter alia* that the High Court had no jurisdiction to review and set aside the second order of sale irrespective of the illegality of the order.

[61] It is evident that in the instant appeal the stance taken by SEASM bears resemblance to decision of the Court of Appeal in *Badiaddin* (above) in opposing the appeal by Popular Acres. The Federal Court in *Badiaddin* (above) however rejected the Court of Appeal's grounds and reversed its decision. In so doing, Mohd Azmi FCJ stated *inter alia* as follows:

> … It is of course settled law as laid down by the Federal Court in *Hock Hua Bank*'s case that one High Court cannot set aside a final order regularly obtained from another High Court of concurrent jurisdiction. *But one special exception to this rule … is where the final judgment of the High Court could be proved to be null and void on ground of illegality or lack of jurisdiction so as to bring the aggrieved party within the principle laid down by a number of authorities culminating in the Privy Council case of Isaacs v. Robertson [1985] AC 97 where Lord Diplock while rejecting the legal aspect of voidness and voidability in the orders made by a court of unlimited jurisdiction, upheld the existence of a category of orders of the court '… which a person affected by the order is entitled to apply to have set aside ex debito justitiae in the exercise of the inherent jurisdiction of the court, without his needing to have recourse to the rules that deal expressly with proceedings to set aside orders for irregularity, and give to the judge a discretion as to the order he will make.* (emphasis added)

[62] In the instant appeal, while there is no breach of a statute, there is a clear and flagrant flouting of, or failure to comply with the express orders of a higher court, rendering the orders of the High Court null and void. This amounts to an illegality, which is *prima facie* evident on a perusal of the record of appeal. The High Court in the instant appeal ought to have appreciated this before simply stipulating that it had no jurisdiction to set aside an order of a court of concurrent jurisdiction. The learned judge, with great respect, failed to consider whether the factual matrix in the instant case gave rise to any illegality warranting an *ex debito justitiae* setting aside of the order of the High Court at Kuala Lumpur dated 19 March 2014. This amounts to an error warranting appellate intervention.

[63] Appellate intervention is necessary to reverse the order of the High Court at Seremban refusing to set aside the decision of the High Court at Kuala Lumpur dated 19 March 2014 rejecting SEASM's application to set aside the sale of the land to Wee. The reasons, as we have stipulated at length

above, are that the said order of 19 March 2014 is fatally flawed for not having given effect to and in fact opposing the express provisions of the two orders of the Court of Appeal expressly setting aside the first order for sale and ordering a second auction. This amounted to an illegality which was sufficient basis to set aside the said order under the narrow principle enunciated in *Badiaddin* (above).

[64] In these circumstances, it is clear that the order of the High Court dated 19 March 2014 did not have the effect of validating the order for sale or the sale to Wee of the subject land.

Issue (c): Whether Popular Acres Is Caught By Res Judicata From Bringing This Application?

[65] This issue is also answered by the Federal Court decision in *Badiaddin* ('above').

[66] The judgment of Gopal Sri Ram JCA is highly relevant in this respect. There His Lordship (as he then was) held that a court of unlimited jurisdiction, even in the absence of express enabling provisions, has inherent power to set aside its orders made in breach of written law. This is what he said at p. 397:

> … As a general rule, orders of a court of unlimited jurisdiction may not be impugned on the ground that they are void in the sense that they may be ignored or disobeyed. However, it is well settled that even courts of unlimited jurisdiction have no authority to act in contravention of written law. Of course, so long as an order of a court of unlimited jurisdiction stands, irregular though it may be, it must be respected. But where an order of such a court is made in breach of statute, it is made without jurisdiction and may therefore be declared void and set aside in proceedings brought for that purpose. It is then entirely open to the court upon the illegality being clearly shown to grant a declaration to the effect that the order is invalid and to have it set aside. It is wrong to assume that such an order may only be corrected on appeal. It is clear in light of the principles established by high authority that a court of unlimited jurisdiction, even in the absence of an express enabling provision, has inherent power to set aside its orders made in breach of written law. The ends of justice will not be met if such a power did not exist. **And the procedural branch of the broad and flexible doctrine of estoppel known as res judicata finds no place in such a circumstance.** (emphasis added)

[67] It is clear from the foregoing that the principle of *res judicata* does not apply in the instant appeal in light of the illegality of the High Court order of 19 March 2014 which expressly contravenes or fails to adhere to the two Court of Appeal orders dated 29 February 2012 and 8 January 2014. Therefore, the instant appeal is a case that falls within the narrow confines of *Badiaddin* ('above') whereby *res judicata* does not operate to prevent the setting aside of the flawed order of the High Court of 19 March 2014.

[68] It is also of significance to note that as submitted by Popular Acres, it is not seeking to re-litigate the matter giving rise to 19 March 2014 order. By this application, Popular Acres is seeking declarations to enforce the two orders of the Court of Appeal.

[69] Further, Popular Acres was never a party to the said application and therefore could not have appealed against the order. That role fell upon SEASM. It was SEASM that failed or neglected to appeal against the said order, resulting in the current predicament. Further, SEASM further prolonged the proceedings by ignoring the first order of the Court of Appeal which set aside the sale of the land and filing a new setting aside application in the High Court on 3 July 2013.

Conclusion On Appeal No. 465

[70] In these circumstances, it follows that the learned judge was plainly wrong in arriving at her decision in Appeal No. 465 and accordingly the appeal is allowed. We therefore set aside the decision of the High Court and allow the application by Popular Acres in terms of paras. i(a), (b), (c), (d), and (e), and paras. ii (a), (b) and (d), and prayer iv of the originating summons. These reliefs are set out below for ease of reference:

(i) For a declaration:

(a) That all proceedings for the sale of the land held under Title No. 61156, Lot 2490, Mukim Rasah, Daerah Seremban, Negeri Sembilan ("land") carried out pursuant to the order of the High Court dated 29 February 2012 granted in the Originating Summons No. 24NCVC-3264-12-2011 ("order dated 29 February 2012") are void;

(b) That the sale of the land carried out by the second defendant (SEASM) pursuant to the order dated 29 February 2012 is void;

(c) That the purchase of the land by the first defendant (Wee) pursuant to the sale carried out by the second defendant pursuant to the order dated 29 February 2012 is void;

(d) That the certificate of sale of the land dated 24 November 2014 issued to the first defendant pursuant to the sale carried out by the second defendant pursuant to the order dated 29 February 2012 is void;

(e) That the first defendant has acquired no registrable interest in the land pursuant to the sale carried out by the second defendant pursuant to the order dated 29 February 2012;

(ii) Consequent to the above, for an order: A

(a) That the first defendant within fourteen (14) days of this order, deliver the original document of title of the land to the second defendant;

(b) That the private caveat, bearing presentation number of 2882/2013 dated 3 April 2013, entered at the instance of the first defendant on the land be removed forthwith; B

(c) (not allowed);

(d) That the second defendant forthwith carry out the order of the Court of Appeal order dated 8 January 2014 given in the Civil Appeal No. W-02(NCVC)(A)-1597-07-2013 and do all things consequential in accordance with the provisions of the National Land Code; C

(iii) (not allowed);

(iv) That the costs of and occasioned to this application be paid by the second defendant, whether jointly and/or severally, to the plaintiff. D

In addition, we order:

(v) That the first defendant is entitled to a refund of the full purchase price paid by him to SEASM together with interest at 5% per annum from the date of the first public auction on 1 November 2012 until date of full settlement. E

[71] In respect of costs, we award costs of RM15,000 here and below against the second respondent, SEASM, to be paid to Popular Acres, subject to allocatur. However, we make no order of costs against the first and third respondents. F

The Implication On The Appeal Of The Liquidator In Appeal No. 85

[72] In Appeal No. 85 which was heard together with Appeal No. 465, the liquidator appealed against Wee's successful application to remove the private caveat entered on the land by the liquidator. Wee maintains that the liquidator has no registrable interest in the land in light of his indefeasible title and therefore has no *locus standi* to remove the caveat. G

[73] As we have concluded that the sale of the land by SEASM to Wee *vide* the first auction is void, the appropriate remedy to be granted against the liquidator is to allow the caveat to remain as the liquidator has established a registrable interest in the land. Accordingly, we allowed the liquidator's appeal in Appeal No. 85. H

[74] Costs are awarded against the second respondent, SEASM, in the sum of RM6,000 here and below to be paid to the liquidator of Popular Acres, subject to allocatur. However, we make no order of costs against the first respondent. The deposit is refunded. I